CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. MAY TERM, 1814.

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DUFAU & AL. vs. MASSICOT & AL.

DUFAU & AL. vs. MASSICOT & AL.

The provisions of the constitution did not extend to the temporary government established by the schedule.

When land is sold, for a partition, the rules relating to sales on a *fi' fa'*, do not necessarily apply.

By the Court. Charles B. Dufau, one of the appellants, and Charles Massicot and Louis Joseph Laurent Wiltz, the appellees, were joint owners of a sugar plantation, situated in the parish of Plaquemines. During the existence of their partnership, two suits were brought against them in the court of that parish, one by Dufau himself, one of the partners, for considerable advances by him made to the concern, and the other by P. F. Dubourg, an hypothecary creditor of the partnership to a large amount. While these suits were pending, Charles Massicot thought it necessary to bring an action, in the same court, against his copartners Dufau and Wiltz, soliciting a dissolu-

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tion of the partnership, and a sale of the joint property, for the purpose of paying the partnership's debts and finally liquidating the concern; at the same time praying a consolidation of his action with those of Dufau and Dubourg. To the dissolution of the partnership and consolidation of the suits all the parties interested gave their assent, and the court decreed accordingly the dissolution of the partnership and sale of the plantation, slaves and other dependencies, payable, to wit, in cash, the amount necessary to satisfy the debts then due, and the remainder at one and two years credit. From this judgment, Wiltz claimed an appeal, to the late superior court, but no security having been furnished by him, according to law, execution issued, and after a first adjudication which could not be carried into effect, the property of the partnership was, on a second exposure, finally struck off to Mansuy Pelletier, one of the appellants. Seven or eight months after the close of those proceedings, the present suit was brought by the appellees, in the court of the first district, praying that the sale made to Mansuy be declared illegal and void, and that they may be restored to the possession of the property sold. From the judgment which they there obtained in their favour, the present appeal has been claimed.

THE plaintiffs below, now the appellees, have raised a variety of objections against the validity

of the proceedings under which the sale of the property of their partnership was made to Mansuy Pelletier.

THE first of them, that on which is bottomed the judgment of the district court, is that the judgment of the parish court of Plaquemines, and the proceedings in execution of it, were written in the French language, at a time when, according to the provisions of our constitution, they ought to have been written in English.

THE judgment is dated the 20th May of 1812; the constitution which provides that all judicial proceedings in this state shall be in English, had been approved by Congress more than one month before; but admitting, it is said, that the provisions of the constitution could not be in force before the official information of that approbation reached us, yet that information having been received shortly after the judgment was rendered, and before any execution had issued, the execution, at least, and the other proceedings under the judgment are void as having been written only in the French language.

IT has already been said by this court, *ante* 2, *Bermudez* vs. *Ibanez*, that the permanent government to be established under our constitution, and the temporary administration provided for by the schedule annexed to that constitution, were separate and unconnected. All the provisions of

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the constitution were applicable to the government to be organised under it, none of them to the temporary government. The express object of the schedule was to maintain the order of things then existing, "*as if no change had taken place*," until the permanent government could be organised. That organisation was not the work of a day, as some persons may have fancied. It was to take place by degrees; the legislature was first to be created; then the executive; then the judiciary. In each branch of the government the constitution could not go into operation before the late authorities were superceded by those of new creation. Any other construction of the constitution and schedule would make their dispositions contradictory and confuse. In this particular instance a Judge unacquainted with the English language was authorised by the schedule to continue his functions; yet how could he continue, if the constitution required him to render his judgments in a language unknown to him? Such are the absurdities into which we are led, when we lose sight of the plain sense of the constitution and schedule, which shows, that the provisions of the constitution were made for the government to be organised under it, and that in the mean time every thing was to go on as formerly.

THE other objections of the plaintiffs to the validity of the proceedings of the parish court of

Plaquemines in these suits are all grounded on the omission of some of the formalities prescribed by the act regulating the practice of the superior court in cases of execution upon judgments for the recovery of money. It is therefore necessary, before they are examined separately, to enquire whether those were the rules which ought to have been observed in this instance.

THE appellants contend that in these consolidated cases the principal suit is that in which the dissolution and liquidation of the partnership were demanded, agreed to and ordered; that this is an action of partition to which the others are only accessory. This appears, indeed, to be the true nature of these actions. The principal action, undoubtedly, is that in which a general liquidation of the interest of all parties is to take place. A sale of all the property of the partnership, for the double purpose of paying all the partnership's debts, and giving each partner his share of the net proceeds, though assimilated by the expressions of the judgment to a sale under execution, has more of the features of a *licitation* than of a sale of property seized. What makes it liable to be confounded with a forced sale, is the opposition of some of the parties to the judgment and execution; but that opposition could not be against the sale itself, for after the dissolution of the partnership agreed to by all the parties, the partition was a matter of course, and none of them did ever pretend that it

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could be effected in any other manner than by a sale. The opposition then must have been against the terms of sale; but the Judge by fixing the terms of this sale did no more than what must be done whenever the parties to a partition cannot agree on the terms or manner of selling their joint property. He also attended to the rights of the creditors of the partnership who could not be compelled to wait. But still the principal action, in these consolidated suits, was that in which the dissolution and liquidation of the partnership, and of course the partition of the partnership's property, were to take place; and the rules of proceeding in cases of partition are those which were to be observed on this occasion. The practice, in such cases, is not very particularly defined. But it appears to us that all the necessary formalities have been fulfilled. Indeed, should the rules of proceeding prescribed, by the act regulating the practice of the superior court, have been of indispensable observance in this instance, it is by no means evident that they were violated.

THE want of a demand of payment in a case where the debtor himself consents to the sale of his property, for the satisfaction of his debts, cannot be seriously complained of.

THE second exposure of the property for sale, before the expiration of the delay prescribed in cases where no adjudication could take place the

first time, was no fault in a case where on a first exposure the property had been struck off to a bidder, who could not comply with the conditions of the adjudication.

The only objection of any moment is that the umpire, instead of taking into consideration the appraisements already made, thought fit to give his own opinion without regard to them, and valued the property less than any of them had done. In this however he acted not against law: for in matters of partition *Febrero* lays it down as a principle *(See Juicios chap. 1, sect. 3, art. 128,)* that the umpire is not bound by the opinions of the preceding appraisers, but may follow his own judgment. He excepts only the case where the umpire has been appointed by the parties themselves; but whatever be his reasons for admitting that exception, they are foreign to the present question.

Upon the whole, this court do not see that any material irregularity has taken place in this case. Nor does it appear that injustice has been done to any of the parties. The appellees were under the pressure of two very heavy claims, when one of them offered and the other consented to the dissolution and liquidation of the partnership. That could not be done without selling their property, and selling it in such a manner as to satisfy the creditors who were threatening them with execu-

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tions. The repeated offers which were made to them by the purchaser to let them have the property on the same, and even on more easy terms than those on which he bought it, and which were constantly rejected, though they could not influence the decision of this court on legal questions, go a great way to convince them that no injury has been done to the appellees, by the manner in which the proceedings were conducted.

It is, therefore, adjudged and decreed that the judgment of the district court be reversed; and that judgment be entered for the appellants with costs.

MAYOR &c. OF N.-ORLEANS vs. *METZINGER.*

An arbitrary grant of public or common land, by a Spanish Governor is void and the court will set it aside.

The defendant, in the year 1795, had obtained from the Baron de Carondelet, then Governor of Louisiana, the grant of a lot of ground joining the levee, in front of the city of New-Orleans, on which he had built a house and which he had enclosed. The plaintiffs, considering this house and inclosure as a nuisance or obstruction to the highway, on part which they contented they incroached, brought the present suit, in order to compel the defendant to remove his improvements and abandon the ground.

It was proved that the premises made part of the space of ground which had been left vacant in

the original plan of the city, between the river and the first row of houses fronting it: that the highway, all along and on both sides of the river, runs immediately by the levee; that, before the Baron's grant to the defendant, the space covered by it was used, as well as the whole ground between the river and the houses, as a part of the highway: that the improvements of the defendant had much narrowed the space, and made an elbow in the highway. The defendant rested his title on his grant, the long possession under it, and the confirmation of his right, by the commissioners of the United States.

There was a judgment in his favour in the district court, from which the plaintiffs appealed.

Moreau, for the plaintiffs. Highways and streets are in the class of things, which are common or public, 1 *Domat*, *part* 1, *liv. prél. tit.* 3, *sect.* 1, *liv.* 2, 3 *Partida*, *tit.* 28, *ley* 6 & 9. Public things are out of commerce, they cannot be alienated, nor consequently acquired by prescription. *Domat*, *loc. cit.* 3 *Partida*, *tit.* 29, *ley* 7, 5 *Partida*, *tit.* 5, *ley* 15. It is forbidden to build on a highway or street, and if it be done, however ancient may be the structure, no prescription can avail, the edifice must be pulled down, unless the corporation of the place chooses to take it on its own account. 3 *Partida*, *tit.* 22, *ley* 3 & 23.

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WITH regard to the grant of the Spanish Governor to the defendant, it affords no pretence to occupy any part of the highway or street. If public things be out of commerce and cannot be the object of a sale, they cannot be that of a gift or grant, or in any manner become the property of an individual. The sovereign, in a regular government, may regulate the use of public things, but cannot dispose of them for any other object than that to which they are destined. Should he do so, he would be guilty of an abuse of his powers. *Vattel, liv.* 1, *chap.* 20, *no.* 146.

THE kings of Spain, were so conscious of their liability to be deceived, by persons who might obtain from them grants of public property, that a law was passed authorising resistance to their orders, in such cases. 3 *Partida, tit.* 18, *ley* 30. It provides that "should the king grant any "letters, detrimental to the rights of the corpora- "tion of any town or place, such first letters shall "not be obeyed: but those, to whom they may "be directed shall supplicate the king to dispense "them from obeying: but, if the king persists, the "execution of his orders must follow." The Cabildo of the city of New-Orleans, having in the year 1799, made representations to the king of Spain, on the grants, made by the governor within the commons of the city, and near the levee; and his Majesty having given no order

thereon, the grants of the governor ought to be considered as null and void, in the same manner as letters of the king would have been.

The king had, at last, annulled all grants which he might have made to the injury of the corporation of any city, and renounced to the right of making any, forbidding any to be made by the Cabildos. *Ord. real. l.* 7, *tit.* 3, *l.* 2 & 3; *Recopilacion de Cast. l.* 7, *tit* 7, *l.* 1.

Ellery, for the defendant. The defendant's original title must be either defective or complete.

If defective, still it is sufficiently legal and valid, to give him a fair and honest possession, and to entitle him to the prescription of ten years.

The requisites of the prescription of ten years are that the estate be fairly and honestly acquired and by virtue of a just title; *Civil Code* 486 488, *article* 67, *vide also Cooper's Justinian, lib.* 2, *tit.* 6, *p.* 95, 96; that claimants should have resided, in the country, that the possessor did not obtain possession by violence, has held it *animo domini*, *Civil Code* 482, *article* 38; that his possession has been continued, uninterrupted, peaceable, public, and unequivocal, *article* 38; has not been suspended by any natural or legal interruption, nor impaired by any acknowledgment of the possessor. *Civil Code* 484, *art.* 21, 52.

It is not contended, on the part of the plaintiffs

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but that all these legal requisitions have been complied with, except

1st. THAT the defendant did not acquire the possession by a *just title.*

2. THAT, even if he had so acquired it, the prescription has been *legally interrupted* by the application made by the Cabildo to the Intendant, in 1799, and by him referred to the king of Spain.

I. THE defendant had such a title as is required by law; a *just title* is defined to be one, by virtue of which property may be transferred, though it may not, in reality, give a *right to the estate possessed, Civil Code* 488, *art.* 68, 1 *Domat*, 3 *l.* 7 *tit. s.* 4, *p.* 490, *translation, Cooper's Just.* 472 *note.*

II. IT is only a *legal interruption*, when the party possessor has been *cited* to *appear* before a *court of justice*, on account of the property or possession, *Civil Code* 489, *art.* 52.

THE burden of proof is also thrown by law upon the claimant, as the possessor is always supposed, by law, to have possessed fairly. *Civil Code* 488, *art.* 71. Again from 1799 when the application was made by the Cabildo, more than 10 years have elapsed since the defendant has been in possession of his lot. But, the defendant's title is complete

1. Negatively: as no title is produced, his possession puts the plaintiff to the necessity of producing his title. Where is his title-deed? Or plan of the city, where this lot is marked, as belonging to the city? If the record and titles of the city are lost or removed, three points are necessary to be proven, 1st. their prior existence, 2. their loss or removal, 3. what they contained: none of these points are proven or appear on the record.

2. Positively: from the production of the deed of concession from Baron de Carondelet in 1795, with the figurative plan and certificate of the surveyor, the signature of the Baron, the certificate of record and of confirmation of the land commissioners.

But, it is objected, 1. that the king of Spain could not alienate the commons of the city, and that this lot was included in the commons.

2. That general usage requires a right of way, next to the levee.

3. That public convenience equally requires it.

1. From 3 *part.* 18 *tit.* 30 *l.* it appears, that the king of Spain possessed the right of alienating even the commons, though, to complete the grants, he must signify his pleasure a second time. But in the interim, until his pleasure was known, was not the grantee always in possession? But this

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lot never belonged to the city; never has been so proven; on the contrary, their own witness says, *it belonged to the king.*

II. GENERAL usage to the right of way is not proven: if so slight a presumption furnishes a legal title, what property is safe? This right of way comes under the class of *servitudes or services*; and they are acquired 1. by nature, 2. by grant, 3. by prescription; *Civil Code* 127, *art.* 3, *also* 2 *Martin* 10, 214, *Navigation Company* vs. *Mayor &c.*; 1. if by *nature*, must be by absolute necessity. 1 *Domat, liv.* 1, *tit* 12, *s.* 1. *p.* 207, *translation.* The levee is an *artificial* road, and does not create a *natural* necessity, 2. if by grant: the grant must be produced. 3. if by prescription: the prescription must be proven; a servitude by prescription ought to have existed from time immemorial, which is construed to be, at least, 100 years, 3 *part. liv.* 15, *p.* 415. This servitude also ought to have been specially pleaded; it is likewise at variance with their own title, upon which they rely.

III. PUBLIC convenience can never justify individual injury. Their act of incorporation has provided a remedy, if this lot was necessary or convenient to them. 1 *vol. Orl. laws p.* 68, 69, § 16. Public convenience, like state necessity, may justify any usurpation.

By the Court. In the year 1795, the Baron de Carondelet, then governor of Louisiana for the king of Spain, granted to Henry Metzinger, the appellee, a lot of ground, situated in the city of New-Orleans close to the levee. The grant is a complete one and has been recognised on the part of the United States by their commissioners.

But the appellants contend that the spot on which it is located is part of the public highway, and, therefore, could not have been lawfully granted for private use, even by the king himself.

That public places, such as roads and streets, cannot be appropriated to private use, is one of those principles of public law, which required not the support of much argument. Nor is there any doubt that if, by a stretch of arbitrary power, the preceding government had given away such places to individuals, such grants might be declared void.

But is this grant located in a street or on the public road? On this important question of fact, the evidence, produced by the appellant, is by no means satisfactory. They show that, according to general usage in this country, the public road in front of the river is close to the levee. But could there be no derogation from that usage? Was that usage observed within the city of New-Orleans? Does not the convenience of placing markets and other public places, as near the water

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as possible, as it is recommended by a law of the Indies (the 5th of the 7th title of the 4th book, vol. 2d.) make it necessary to deviate from such usages in cities?

GENERAL usage, however, is the only ground on which the appellants rest their pretension. No plan of the city has been exhibited to show that the lot of the appellee is located upon a place which had been reserved for public use: no testimony has been adduced to prove that this spot is part of the ground laid out for the public road. We are called upon to declare this grant void, merely because the general usage of the country is to place the road next to the levee.

WE do think, however, that to oust the grantee and possessor of this lot something more precise than this vague and uncertain evidence is necessary; and we do accordingly adjudge and decree that the judgment of the district court be affirmed with costs.